Supreme Court, U.S.
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No. _____

In The
IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

DAVID PORTER, PETITIONER

v.

UNITED AUTOMOBILE AEROSPACE
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA-UAW;
ROY HERNANDEZ; and
JOHNSON CONTROLS, INC., RESPONDENTS[1].

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[1] All of the parties in the United States Court of Appeals for the Fifth Circuit are listed in the caption.

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit Court of Appeals erred in affirming the actions of United States District Court which denied Petitioner's right to a jury trial under the Seventh Amendment to the Constitution of the United States of the material issues of disputed fact by granting a Summary Judgment based upon a misapplication of the law; a wrongful and erroneous determination of the disputed facts; and a determination which omitted and misstated essential material facts.

2. Whether an International Representative (Int. Rep.) of an International Union (Int. Union) has the right to unilaterally, <u>secretly</u> cancel, arbitration proceedings of an employee's grievance which were in process where:

a. the arbitration proceedings were mandated by the Collective Bargaining Agreement (CBA) as the arbitrator had been selected;

b. the CBA specifically provided that the exclusive representative of the employees was <u>both</u> the Int. Union <u>and</u> the Local Union; and

c. the secret cancellation of the arbitration proceedings was:

1) without the consent and contrary to the adamant desires of the Local

Union and the employee; and,
2) not in compliance with 29 U.S.C. §173(d) which declares and strongly infers that settlements of arbitration proceedings be by agreement of all of the parties.

3. Whether the United States District Court erroneously violated Petitioner's right to a jury trial under the United States Constitution on the determination of whether the conduct of the Int. Rep. was so arbitrary and/or in bad faith as to amount to a breach of his duty of "fair representation".

4. Whether the United States District Court erroneously violated Petition's right to a jury trial under the United States Constitution on the disputed issue of whether the employer violated the CBA in firing the employee.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT 1

REPORT OF OPINION 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE PETITION 10

Preface 10

Breach of Fair Representation by UAW and Hernandez 12

Breach of the CBA by Johnson in Terminating Porter 19

CONCLUSION 23

TABLE OF AUTHORITIES

Page

Cases

Air Line Pilots Ass'n. Int'l v O'Neill, 499 U.S. 65, ___, 111 S.Ct. 1127, 1130 (1991) 13

Florence v Frank, 774 F.Supp. 1054 (N.D.Tex. 1991) 14

Harrison v United Transportation Union, 530 F.2d 558 (C.A.4 1975) 14

Peterson v Kennedy, 771 F.2d 1244 (C.A.9 1985), cert. denied 106 S.Ct. 1642, 475 U.S. 1122, 90 L.Ed.2d 187 14

Robesky v Qantaz Empire Airways Ltd., 573 F.2d 1082 (C.A.9 1978) 14

Schultz v Owens Illinois, Incorporated, 696 F.2d 505 (C.A.7 1982) 14

Swatts v United Steel Workers of America, 808 F.2d 1221 (C.A.7 1986) 14

Vaca v Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 843 (1967) 14

Constitution

The Seventh Amendment to the United States Constitution, ii, 2, 11, 12

Statutes

28 U.S.C. §1254 2

28 U.S.C. §1331 2

29 U.S.C. 159(a) 12

29 U.C.S. §173(d) . . . . . ii, 4, 18

29 U.C.A. §185(a)(c) 2, 4

29 U.S.C. §187 . . . . . 2, 4

Rules

Fed.R.Civ.P. 38 . . . . . 2, 12

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

A Writ of Certiorari is respectfully sought by the Petitioner, David Porter, to review the judgment of the United States Court Of Appeals for the Fifth Circuit which affirmed the summary judgment of the United States District Court For The Northern District Of Texas.

REPORT OF OPINION

The United States Court Of Appeals For The Fifth Circuit did not issue an opinion in rendering either its judgment (App. 16), or in denying Petitioner's separate Petition For Rehearing and Suggestion For Rehearing En Banc (App. 18). The Opinion of United State District Court For The Northern District of Texas is not reported but appeared in the Appendix (App. 1).

JURISDICTION

The judgment of the United States Court of Appeals For The Fifth Circuit was entered and filed April 8, 1994 (App. 1). Petitioner's Petition For Rehearing And Suggestion For Rehearing En Banc to the United States Court Of Appeals For The Fifth Circuit were Denied on May 11, 1994 (App. 2). The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. §1254, 28 U.S.C. §1331, 29 U.C.A. §185(a)(c), and 29 U.S.C. §187.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Seventh Amendment to the United States Constitution provides in relevant part:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved..."

2. Fed.R.Civ.P. 38 provides in relevant part:

> "(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury (1) serving a demand...at any time after commencement of the action and not later than 10 days after service of the last pleading directed to such issue...Such demand may be endorsed up a pleading of the party...

(c) Same: Specification of Issues. In the demand a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable..."

3. 29 U.S.C. 159(a) provides in relevant part:

"(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all of the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment..."

4. 29 U.C.S. §173(d) provides in relevant part:

> "(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement..."

5. Federal subject jurisdiction of this case exists under 29 U.S.C. §185(a)(c), and §187, and specifically 29 U.S.C. §185(a), which provides , in relevant part:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE

Petitioner, David Porter (Porter), was a 16 year employee of Respondent Johnson Controls, Inc (Johnson) and a dues-paying member of Respondent, United Automobile Aerospace and Agricultural Workers of America-UAR (UAW), and its Local Union #119 (Local Union).

There was a Collective Bargaining Agreement (CBA) between Johnson, as the "Company"; and the UAW and Local Union, as the "Union".

The CBA specifically provides that the Company recognizes the "Union" as the exclusive representative, as certified by the NLRB, of all of the employees. (Emphasis Ours).

On June 4, 1990, Porter was fired by Johnson for refusing his supervisor's 2:15 P.M. order to work overtime on May 29, 1990. The shift was to end at 2:45 P.M. Porter had refused the overtime because he had to pick up his 9 year old son at school, and he was not given sufficient notice to make other arrangements. Porter had advised his supervisor of his problem a week earlier, that the problem would last until school was out in a couple of weeks, and that he would need sufficient notice of the need for overtime so he could make other arrangements.

A jury question was created as to

whether Porter's firing constituted a breach of the CBA as the termination was a change in the Johnson's policy of interpreting company rules. Prior employees who had refused overtime had not been fired. Although the CBA required prior notice to the Local Union and employees of a change in company policy, no notice had been given. Porter's firing therefore constituted a breach of the Collective Bargaining Agreement (CBA).

A jury question was also created as to whether Porter's firing constituted a violation of the CBA. The CBA also mandated, that in issuing orders for overtime, an employee's circumstances were to be taken into consideration. There was no evidence that Porter's circumstances were taken into consideration by Johnson in issuing the order for overtime.

A jury question was additionally created as to whether the order for overtime was a reasonable order. Johnson's Rules and Guidelines required that before an employee could be terminated for disobeying an order of a supervisor, the order must be "reasonable". There was no summary judgment evidence that the order was "reasonable".

A grievance was filed by the Local Union under the CBA. Johnson's management refused to reinstate Porter after the Step

2 and 3 meetings with the Local Union (the UAW International Representative [Hernandez] attended the Step 3 meeting, but not the Step 2 meeting). Following the 30 day discretionary period under the CBA in which the "Union" had the option to drop the grievance, the "Union" decided to invoke the mandatory provisions of the CBA to take the case to arbitration. On July 16, 1990, at the request of the Local Union, a formal request for mediation was sent by Hernandez to the U S Mediation and Conciliation Service (Arbitration Service).

On October 17, 1990, Mike Cross, Committeeman of the Local Union, advised the Arbitration Service that the Parties had selected Francis X Quinn as the arbitrator. On October 23, 1990, the Arbitration Service appointed Mr Quinn as the arbitrator.

On or about October 16, 1990 an offer was made by Johnson to reinstate Porter with full seniority, but without back pay and with 3 months probation. Hernandez communicated the offer as being that Porter could return without back pay and without seniority. Hernandez also told Porter his case was unwinnable and inferred he was going to withdraw the case from arbitration. Porter refused the offer. A few days later Johnson's offer was withdrawn.

On October 22, 1990, after learning of Hernandez's conversation with Porter, the Local Union became so enraged at Hernandez, that its Chairman, Mike Cross, wrote Hernandez that in the future he (Hernandez) should refrain from representing the Union's position in the plant.

On January 2, 1991, Local Union Chairman Cross wrote Johnson trying to elicit open dates to be communicated to the Arbitration Service for an agreeable date for the arbitration hearing.

In early February, 1991, without prior consultation with the UAW, the Local Union, or Porter, Hernandez secretly called arbitrator Quinn and falsely told Mr Quinn that Porter's arbitration case had been "settled". Hernandez admits that he did not thereafter tell either Porter, Cross, or the Local Union Bargaining Committee of the action he had taken. In early March, 1991, Mr Quinn advised the Arbitration Service that Porter's arbitration case had been "settled/withdrawn".

After appealing the actions of Hernandez to the Executive Board of the UAW and receiving an adverse decision, Porter filed suit against the UAW, Hernandez and Johnson. He claimed the UAW and Hernandez had breached their duties of "Fair Representation" by breaching both

the UAW agreements with the Local Union and the CBA of which he was a third party beneficiary by unilaterally canceling the arbitration case. He claimed his discharge by Johnson violated the CBA.

The UAW, Hernandez and Johnson filed motions for Summary Judgment which the District Court granted on June 21, 1993.

REASONS FOR GRANTING THE PETITION

Preface

This case is important because the judgment of the United States Court of Appeals for the Fifth District in affirming the judgment of the United States District Court for the Northern District of Texas has rendered a decision in direct conflict with other United States Courts of Appeal. This conflict is detailed below.

This case is also important because the judgment of the Court of Appeals in affirming the judgment of the District Court has sanctioned such a departure by the District Court from the law and the Fed.R.Civ.P. as to call for an exercise of this Court's power of supervision.

This case is unique and apparently of first impression. In all of the reported cases we have found involving the Union's handling of an employee's grievance, the International Union and the Local Union were in such agreement that the separate entities were considered in the opinion to be one and the same. Additionally, there was no question in the various opinions, but that the Union was the exclusive representative of the employee seeking arbitration of his grievance.

Here, the UAW and the Local Union

were at odds with each other, and the Collective Bargaining Agreement (CBA) only authorized the UAW and the Local Union, collectively, to be the exclusive representative of the employee seeking arbitration.

After joining with the Local Union to request arbitration under the CBA, making arbitration proceedings mandatory under the CBA, the UAW then decided it did not want to arbitrate the case, while the Local Union continued to be adamantly in favor of pressing the employee's grievance through the arbitration process.

The case is also important because it points up how the district courts are making substantial departures from the law and the Fed.R.Civ.P. in using the summary judgment process to "clear" their dockets of jury cases. In doing so, the district courts are misapplying the law, and making erroneous determinations of material disputed facts with their actions being covered up on appeal by Courts of Appeal which simply deny an appeal without an opinion. By affirming a district court summary judgment without an opinion in a jury trial case where the district court has erroneously made determinations of disputed issues of fact, is an outrageous denial and gross miscarriage of justice, in direct violation of the Seventh Amendment to the United States

Constitution. Such conduct by the lower courts constitutes an abuse of the summary judgment system which should be rectified by this Court.

This is a jury trial case. In accordance with the provisions of Fed.R.Civ.P. 38, Porter endorsed on his Complaint his demand for a jury trial of all issues. In accordance with Rule 38, and the Seventh Amendment to the United States Constitution, Porter was entitled to have a jury trial upon all material issues of disputed fact.

Breach of Fair Representation by UAW and Hernandez

The first point that must be recognized in this case is that Hernandez (UAW) did not have any unilateral authority in this grievance process as detailed in the Collective Bargaining Agreement (CBA).

29 U.S.C. §159(a) specifically provides that the "exclusive representative" of the employees with reference to matters such as grievances is a matter determined by the "majority" of the employees.

The CBA in evidence between Johnson Controls, Inc as "Company" and the UAW and its Local Union #119, clearly provides in

its preamble and in Article I - RECOGNITION - §1:

> a. that the UAW and its Local Union #119, (collectively) are hereinafter called the "Union"; and,
>
> b. that the Company recognizes the "Union" as the exclusive representative, as certified by the NLRB of all of the employees. (Emphasis Ours).

There is nothing in the CBA which in any way gives the UAW any right to act unilaterally in the grievance procedures which are outlined in detail.

Therefore, Hernandez and the UAW, did not have any right unilaterally to cancel Porter's arbitration case.

It is therefore urged that the District Court was in error not only in treating Hernandez and the UAW as having the right to cancel the arbitration case, but also in erroneously applying the wrong standard to determine that the actions of Hernandez were not "arbitrary or in bad faith".

In reviewing the record and holding that Hernandez "did no wrong", the District Court erroneously applied the standard announced in Air Line Pilots Ass'n. Int'l v O'Neill, 499 U.S. 65, ___, 111 S.Ct. 1127, 1130 (1991), a collective bargaining case, that Hernandez's conduct could only be held to be arbitrary if "in

light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational."

This Court in Vaca v Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 843 (1967) recognized that in situations such as the processing of an employee's grievance, as opposed to a collective bargaining case, a more demanding standard should apply. This distinction has been recognized in a number of lower court decisions, many of which from United States Courts of Appeal. See Swatts v United Steel Workers of America, 808 F.2d 1221 (C.A.7 1986); Schultz v Owens Illinois, Incorporated, 696 F.2d 505 (C.A.7 1982); Robesky v Qantaz Empire Airways Ltd., 573 F.2d 1082 (C.A.9 1978); Harrison v United Transportation Union, 530 F.2d 558 (C.A.4 1975); Peterson v Kennedy, 771 F.2d 1244 (C.A.9 1985), cert. denied 106 S.Ct. 1642, 475 U.S. 1122, 90 L.Ed.2d 187; Florence v Frank, 774 F.Supp. 1054 (N.D.Tex. 1991).

In Harrison, supra, the Court of Appeals held that the union's actions or conduct must service the interest of all of its members without hostility, discrimination, arbitrariness or capriciousness toward any. In Florence, supra, the Court said the union's conduct must be non arbitrary. In Robesky, supra,

the Court said the Union will be held accountable if its intentional acts or omissions by its officials are so arbitrary as to reflect a reckless disregard for the rights of an individual employee, or it severely prejudices the injured employee, or the policies underlying the union's duty of fair representation would not be served by shielding the union from liability in the circumstances of a particular case.

Not only did the District Court apply the wrong standard of care, but it also usurped Porter's right to a jury trial by erroneously making determinations of disputed issues of fact of whether the conduct of Hernandez was arbitrary; and misstated and omitted material facts.

As an example of misstating facts, the District Court gave Hernandez credit for "handling the grievance to the 3rd Step" of the CBA grievance process, while overlooking Hernandez's own testimony that he did not enter the process until the 3rd Step. In praising Hernandez for attempting to settle the case with the Company, it failed to consider that in communicating the Company's offer to Porter that he could return, but without back pay, Hernandez misstated the offer by also advising Porter he would lose his seniority. In holding that the CBA does not require that all grievances be

presented for arbitration (citing Article III §6 of the CBA), it failed to recognize that the cited section specifically provides that, the "Union" may take the grievance to arbitration, and in such event, "such arbitration must be held within three (3) months of the selection of the arbitrator..." (Underlining Ours).

The District Court then set forth some of Porter's various points as to why the conduct of Hernandez must be considered arbitrary, to which the District Court either erroneously:

(1) it thrust the burden upon Porter for failing to cite authority for the point (whereas it was the UAW or Johnson's point to disprove by proper authority), or

(2) it erroneously held that even if the facts urged by Porter were true the allegations do not amount to arbitrary or bad faith conduct as the stated facts are not "so outside a range of reasonableness as to be irrational".

On the issue of whether the conduct of Hernandez and the UAW was arbitrary or in bad faith, Porter provided substantial summary judgment evidence on at least the following points:

(1) that from the onset of Hernandez's involvement at the Step 3 meeting with management, he took management's side;

(2) that Hernandez refused to

consider the true facts of what happened as related to him by Local Union members;

(3) that Hernandez refused to consider that Porter's termination was, from the Local Union's stand point, just another instance when Johnson had changed its policies without notice which was in direct violation of the CBA;

(4) that Hernandez refused to consider that Porter was a good employee and that his circumstances of having to pick up his 9 year old son had not been taken into consideration by Johnson;

(5) that Hernandez refused to consider that failure to give Porter notice before noon of the need for overtime was unreasonable as there was evidence that the Johnson knew of the need long before noon that day;

(6) that Hernandez misrepresented to Porter the Company's settlement offer;

(7) that his attitude that the case was unwinnable and other actions so outraged the Local Union that Hernandez was told to stay out of the case by the Local Union;

(8) that his hostile attitude toward Porter was evidenced when Hernandez made blatant misrepresentations to the NLRB about Porter in order to "poison" Porter's complaint;

(9) that even though Hernandez had been told by the Local Union to stay out

of the Porter grievance, and even though the arbitration process was now mandatory as the "Union" (under the CBA) had jointly requested arbitration Hernandez secretly called, the selected arbitrator and misrepresented to the arbitrator that the case had been settled; and

(10) that the call to the arbitrator by Hernandez was without the consent of the Local Union which very much wanted Porter's case to be arbitrated as the Local Union felt that Porter had a meritorious case and that it should be arbitrated. On this point it is respectfully urged that once the arbitration process had become mandatory upon the selection of the arbitrator (CBA Article III §6) Porter became an official party to the proceedings as they were brought in Porter's name. If so, Hernandez did not have the right to "settle" the arbitration case without the specific agreement of the Local Union and Porter. This fact is affirmed in the Congressional mandate of 29 U.S.C. §173(d) in which Congress declares that "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes..."

The judgment of the Court of Appeals which affirmed the District Court's application of the standard of care used

in collective bargaining cases of "so outside the range of reasonableness as to be irrational" as approved in O'Neill, supra, to determine whether the conduct of the union is arbitrary or in bad faith is in direct conflict with decisions of other United States Courts of Appeals, as cited above, which apply a more demanding standard.

Whether or not the actions of Hernandez and the UAW were arbitrary or in bad faith necessarily involves Hernandez's intent, his motives and truthfulness which can ordinarily best be determined by the "trier of the facts" by Hernandez's testimony and demeanor on the witness stand.

It seems clear that reasonable men might differ as to whether or not the conduct of Hernandez was arbitrary or in bad faith. If so, Porter was entitled to a jury determination on this point and not a determination by the District Court.

Breach of the CBA by Johnson in Terminating Porter

The District Court erroneously determined that Johnson did not violate the CBA in terminating Porter.

In clear unambiguous language the CBA provided, among other relevant things:

1. that when overtime is required, notice will be given as soon as practical and no later than noon except in circumstances beyond the control of the company;
2. that individual problems regarding overtime will be given consideration; and,
3. that before Johnson can make a complete departure from past practices, they will be discussed and explained to the union, and the employees will be informed before implementation.

Porter presented substantial summary judgment evidence, as follows:

1. Johnson probably could have given Porter the required notice of the need for onetime before noon on May 29, which would have enabled him to make arrangements for his son to be picked up. Johnson's own documents reflect it knew on May 25, 1990, or 4 days prior to May 29, that an employee on the second shift had been hurt on the job, and having gone to the Company doctor for treatment on the 25th, Johnson probably knew the doctor had rescheduled the hurt employee for another doctors appointment the afternoon of the 29th. There was no summary judgment

evidence offered by Johnson that it did not know of the need for overtime prior to noon of May 29;

2. Johnson admitted it knew about Porter's problem with picking up his son from school at least a week prior to May 29. There was no summary judgment evidence produced by Johnson that it took Porter's circumstances into consideration is issuing the order for overtime;.

3. Prior to May 29,1990, other employees who had refused overtime, and none had not been fired Johnson had not given any notice to the Local Union or the employees that it was changing its long standing policy. Johnson did not produce any evidence to counter this evidence.

Porter was terminated under Johnson's Rules and Guidelines for disobeying a reasonable order of a supervisor. No attempt was made by Johnson to present evidence that the order for overtime was reasonable.

In the face of the substantial summary judgment evidence that Johnson violated the CBA, the District Court erroneously proceeded to make its own determinations of the disputed issues of fact.

The District Court concluded Johnson did not know of the need for overtime

until 2:00 p.m. with considering Johnson's own records of the employee's visit to Johnson's own doctor 4 days earlier, and that he scheduled another appointment the afternoon of the 29th.

The District Court did not try to address the question of whether the order for overtime was a "reasonable" instruction entitling Johnson to terminate Porter, nor did it address the question of the termination being a complete departure of policy without notice to the Local Union and the employees.

A jury was supposed to be the trier of the facts. When the District Court rendered its Summary Judgment, it usurped Porter's right to a jury trial of the disputed facts, by making determinations of the disputed issues of fact.

The judgment of the Court of Appeals action of affirming the District Court's grant of a summary judgment in which the District Court usurped Porter's right to a jury trial by clearly misapplying the law; made determinations of disputed issues of material fact; and in making such determinations, misstated and omitted material issues of facts, is a sanctioning of such a departure by a lower court of the law and Fed.R.Civ.P. that it calls for an exercise of this Court's power of supervision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Arch M Skelton
Arch M Skelton, P C

Attorney for Petitioner
David Porter

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DAVID PORTER	§	
PLAINTIFF,	§	CIV ACTION NO
VS	§	3:92-CV-0690-D
UNITED AUTOMOBILE,	§	
AEROSPACE AND AGRI-	§	
CULTURE IMPLEMENT	§	
WORKERS OF AMERICA,	§	
ET AL	§	

MEMORANDUM OPINION
AND ORDER
Filed June 21, 1993

Before the court are two motions for summary judgment filed by defendants United Automobile Aerospace and Agricultural Implement Workers of America ("UAW") and Roy Hernandez ("Hernandez") and by defendant Johnson Controls, Inc. ("Johnson Controls"). For the reasons that follow, the court grants the motions.

I

Porter was an employee of Johnson Controls and a member of UAW. On May 29, 1990, when Porter's supervisor gave him a direct order to work four hours overtime that evening, Porter said he had to pick up his child at school and refused. On June 4, 1990 Johnson Controls discharged Porter for insubordination. UAW filed a

grievance on Porter's behalf, and appealed the grievance to the third step of the grievance procedure. On October 17, 1990 defendant Hernandez, who is an agent of UAW, and who handled the appeal of the grievance to the third stage, informed Porter that Johnson Controls agreed to reinstate him without back pay and that the grievance would not be submitted to arbitration because it was not winnable. Hernandez sent Porter a letter to this effect on November 6, 1990. On April 12, 1991 Porter appealed Hernandez' decision not to pursue arbitration to the International Executive Board ("IEB"). The IEB rejected Porter's appeal in a letter dated January 24, 1992. Porter did not take any further appeals.[2]

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[2]Porter also filed a charge with the National Labor Relations Board ("NLRB"). The NLRB refused to issue a complaint because the settlement offer of reinstatement without back pay was reasonable and because there was no evidence the UAW's decision not to arbitrate was based on any unlawful motive. See Dec. 12, 1990 letter from NLRB regional director (UAW and Hernandez MSJ Ex. 18). Porter appealed this decision, but the charge was again refused. See Jan. 22, 1991 letter from NLRB director of office of appeals (id. Ex. 20).

Porter brought this action on April 10, 1992, alleging that Johnson Controls breached the Collective Bargaining Agreement ("CBA") between Johnson Controls and UAW by discharging him, and that UAW and Hernandez breached their duty of fair representation by withdrawing Porter's grievance from arbitration. Porter also contends the defendants conspired with one another to deprive him of his rights under the CBA and of his right to fair representation. Porter further asserts claims of breach of contract against Hernandez and the UAW. Porter seeks monetary damages and attorney's fees; he does not seek arbitration or judicially-decreed reinstatement.

By separate motions, defendants move for summary judgment, raising many of the same arguments. The court will consider each of the arguments below.

II

The court first considers defendants' contention that Porter cannot prove UAW breached its duty of fair representation.

A union's duty to fairly represent employees is violated "only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. 171, 190(1967). "[A] union's actions are arbitrary only if, in light of the factual and legal landscape

at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." Air Line Pilots Ass'n. Int'l v. O'Neill, 499 U.S. 65, ___, 111 S.Ct. 1127, 1130(1991) (citation omitted). "Any substantive examination of a union's performance...must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities." Id. at ___, 111 S.Ct. at 1135. A union may exercise discretion in deciding whether a grievance warrants arbitration. Turner v. Air Transp. Dispatchers' Ass'n, 468 F.2d 297, 299 (5th Cir. 1972). In representing an employee in a labor dispute, "the union has the power to...abandon processing of a grievance which it determines in good faith to be meritless, and to settle disputes with the employer short of arbitration." Harris v. Chemical Leaman Tank Lines, Inc., 437 F.2d 167, 171 (5th Cir. 1971).

The summary judgment evidence shows that Hernandez investigated Porter's grievance by meeting with employees, union officials, and Johnson Controls officials, and that he discussed the grievance with union officials experienced in handling such matters. Hernandez Dept. at 12-22, 29-37. Pursuant to the CBA, if no

employees volunteer to work overtime, the employee with the fewest overtime hours may be required to work. CBA Art. IV § 3(a). The CBA further provides that notice will be given as soon as practical and no later than noon for daily overtime except in circumstances beyond the control of the company, but that "[t]his commitment shall not be construed to permit the employee(s) with the fewest overtime hours to refuse to work daily overtime when required due to absenteeism. Id. § 3(b). Hernandez's investigation revealed that Porter had the fewest hours of overtime and was asked to work overtime due to the absence of another employee. Hernandez Aff. to NLRB at 2-3. Porter refused to work the overtime and as a result was suspended for insubordination.[3] Hernandez negotiated a settlement with Johnson Controls in which Johnson Controls agreed to reinstate Porter with a

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[3]Porter was found to have violated Johnson Controls' Intolerable Rule 6, which prohibits the "refusal to obey a reasonable instruction of any supervisor." Intolerable Rules Infractions, Johnson Controls MSF Ex. 1. The penalty for violating the rule is "immediate discharge upon the first offense unless there are moderating circumstances which, in the Company's discretion, allow a lesser penalty." Id.

probationary period, but without back pay. Hernandez Dep. at 86-89. Based on his investigation, Hernandez concluded the offer of reinstatement was more than Porter deserved and did not see any possibility that arbitration would result in Porter's reinstatement with backpay. Hernandez Aff. to NLRB at 4-5. When Porter refused this offer, it was withdrawn. The CBA does not require that all grievances be presented to arbitration. Jack Horne Aff. at ¶ 4; CBA Art. III § 6.[4]

Based on the record, it does not

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[4]Article III § 6 of the CBA Provides:

> In the event the Company's reply to Step 3 is not acceptable to the Committee Chairman, Bargaining Committee and the Union International Representative, the Union may take the grievance to arbitration by notifying the Company within thirty (30) days of receipt of the answer in Step 3 or the grievance shall be closed. If notified, such arbitration must be held within three (3) months of the selection of the arbitrator.

(emphasis added).

appear that Hernandez's decision to forego arbitration of Porter's grievance was "so far outside a wide range of reasonableness as to be irrational." O'Neill, 499 U.S. at ____, 113 S.Ct. at 1130 (citation omitted). He investigated the grievance and found in good faith that the grievance was not "winnable" in arbitration. The fact that he negotiated a settlement with Johnson controls in which Porter was to be reinstated belies any assertion that Hernandez was acting arbitrarily or in bad faith in representing Porter.

Porter raises a number of arguments in support of his allegation of unfair representation. First, Porter asserts that Hernandez unilaterally withdrew the grievance from arbitration and that neither the UAW Constitution nor the CBA gave Hernandez the authority to act unilaterally. Porter fails, however, to provide any support for his assertion that Hernandez alone could not make the decision to withdraw the case from arbitration.[5]

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[5]In support of this argument, Porter relies upon article 19 § 2 of the UAW Constitution, which provides in pertinent part:

> When a grievance exists between a Local Union and management

Porter also posits that once the arbitration process had begun, it was mandatory that arbitration take place. Porter contends the local union representative and bargaining committee had decided to arbitrate the grievance and an arbitrator was selected. According to Porter, once this had occurred, Hernandez lacked the authority to withdraw the case from arbitration. This argument is also without merit. Porter refers to no authority to support his contention that once an arbitrator is selected, the arbitration must commence. Although an arbitrator may have been selected, it is clear that arbitration had not yet begun

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> and negotiations are in progress and an International Union Officer or representative is participating by request of the Local Union involved, a committee selected by the Local Union shall participate in all conferences and negotiations.

Porter's reliance upon this section is misplaced. Article 19 is entitled "Contracts and Negotiations" and is applicable to collective bargaining negotiations. Ophalandus Brasfield Aff. at 2. It is not applicable to Porter's grievance against Johnson Controls regarding his termination.

when the grievance was withdrawn.

Porter next argues that Hernandez acted arbitrarily and in bad faith during the grievance process. In support of this contention, Porter relies upon Hernandez's alleged delay in setting a hearing date, Hernandez's telling Porter that his case was unwinnable, and the filing of an allegedly "secret" and false affidavit with the NLRB in response to Porter's complaint. Even if taken as true, these allegations do not amount to arbitrary or bad faith conduct. A delay in setting a hearing date is not "so outside a range of reasonableness as to be irrational." O'Neill, 499 U.S. at ___, 111 S.Ct. at 1130. A union representative is entitled to be frank and honest with a union member and tell him when a case is unwinnable. And even if Hernandez filed a so-called secret and false affidavit with the NLRB, he did so in connection with a collateral legal matter, not as part of the grievance process itself.

Accordingly, the court finds that UAW's and Hernandez's representation of Porter in connection with his grievance was neither arbitrary, discriminatory, nor in bad faith. The decision not to invoke arbitration after evaluating the merits of Porter's grievance constituted a permissible exercise of the union's discretion. Defendants' motion for

summary judgment is granted as to Porter's claims that UAW and Hernandez breached their duty of fair representation, breached the CBA, and breached the UAW Constitution.[6]

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[6]The UAW and Hernandez also assert that Porter lacks standing to bring the breach of contract claim against them because he is no longer a member of the union. Defendants contend that the breach of contract cause of action recognized by the supreme Court in Woodell v. International Bhd. of Electric. Workers Local 71, ___ U.S. ___, 112 S.Ct. 494, 500-01(1991), is available to union members only. According to defendants, because Porter was not a union member at the time he filed this action, he lacks standing to pursue this claim. The court disagrees. In order to establish standing, Porter must allege an actual or threatened injury, that is caused by another party and is likely to be redressed by the relief requested. New Orleans Public Serv., Inc. v. Council of New Orleans, 833 F.2d 583, 588(5th Cir. 1987). Porter has alleged that Hernandez and UAW breached the CBA and the UAW Constitution while he was a member of UAW, and these breaches caused him injury for which he seeks monetary relief. His current status as a nonmember of UAW is irrelevant to this inquiry. Accordingly, the court holds that Porter has standing as a third party beneficiary to assert his claims for

III

Defendants next argue that they are entitled to summary judgment as to Porter's ;claim that Johnson Controls breached the CBA by terminating him. Defendants contend the CBA expressly provides that employees with the fewest overtime hours may not refuse due to absenteeism to work daily overtime when required to do so. According to defendants, when Porter refused to work overtime on May 29, 1990, he violated Johnson Controls' Intolerable Rule 6, the penalty for which is termination.

Porter responds that he was wrongfully discharged under Intolerable Rule 6 because that rule provides that an employee may be discharged for refusal to obey a reasonable instruction of a

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breach of the CBA and of the UAW Constitution that allegedly occurred during a period when he was a union employee. See Tinsley v. United Parcel Serv., Inc., 635 F.2d 1288, 1291 n.7(7th Cir. 1980) (magistrate found that plaintiff's union membership status was irrelevant because he was a full member at time of discharge and processing of grievance; subsequent withdrawal from union did not affect plaintiff's rights and obligations which accrued when the contract was in effect), vacated on other grounds, 452 U.S. 934(1981).

supervisor unless there are moderating circumstances. Porter contends the order to stay and work overtime was not reasonable. In addition, Porter argues the order -- which he received at approximately 2:15 p.m. on May 29, 1990 -- was in violation of the CBA, which entitled Porter to notice prior to noon on that day. Porter further contends that Johnson Controls could have reasonably anticipated its need for overtime work, and that Johnson Controls did not take into consideration Porter's need to pick up his child.

The record shows that the order to Porter to work overtime on May 29, 1990 was not unreasonable. Allen Arnold ("Arnold"), who was Porter's supervisor on May 29, 1990, testified that at approximately 2:00 p.m. on that date, a second shift operator brought a doctor slip stating that she could not work at her regular position. Arnold Aff. at 2. Arnold sought volunteers to work four hours of overtime, but was unable to find any. Id. The week before, Arnold had told Porter that employees may be needed to work overtime and that Porter, who had the fewest overtime hours, would be required to work. Id. at 1. Arnold then confirmed that Porter had the fewest overtime hours and instructed Porter to stay and work overtime. Id. at 2. The

CBA explicitly states that if there are no volunteers, employees with the fewest overtime hours may be required to work overtime. CBA Art. IV § 3(a). Even though the CBA does provide that notice will be given by noon for daily overtime, it also provides an exception for "circumstances beyond control of the Company." CBA Art. IV § 3(b). Based on the evidence before it, the court concludes that Johnson Controls did not know that it would need an employee to work overtime on May 29, 1990 until approximately 2:00 p.m., and Porter was notified that he would have to work overtime shortly thereafter. Thus, notice was not provided to Porter before noon due to "circumstances beyond the control of [Johnson Controls]."

Section 3(b) also provides "[t]his commitment shall not be construed to permit the employee(s) with the fewest overtime hours to refuse to work daily overtime when required due to absenteeism. Individual problems regarding required overtime will be given consideration." CBA art. IV § 3(b). Although Porter does not contest that he had the fewest hours, he does contend that Johnson Controls did not take into account his need to pick up his child in issuing the overtime order. Section 3(b), however, does not require that Johnson Controls refrain from

ordering employees to work overtime because of individual problems; it merely states that Johnson Controls will give such problems consideration. Accordingly, the court holds that Johnson Controls did not violate the CBA when it ordered Porter to work overtime on May 29, 1990.

Porter also contends the CBA requires just cause for termination and Johnson Controls did not have just cause to terminate him. The court disagrees. Intolerable Rule 6 explicitly provides that an employee may be terminated for refusal to obey a reasonable instruction of any supervisor. Because Porter refused to obey a legitimate order to work overtime on May 29, 1990, Johnson Controls had just cause to terminate his employment. Accordingly, defendants' motion for summary judgment is granted as to Porter's claim that in terminating Porter, Johnson Controls breached the CBA.

IV

Having determined that UAW and Hernandez did not breach their duty of fair representation, and that Johnson Controls did not breach the CBA, the court also grants defendants' motions for summary judgment as to Porter's conspiracy

claim.[7]

SO ORDERED.

June 21, 1993.

SIDNEY A FITZWATER
UNITED STATES DISTRICT JUDGE

[7]Defendants also argue that Porter's claims are barred by the statute of limitations and by his failure to exhaust administrative remedies. Because the arguments addressed supra at §§ II and III are dispositive, the court does not reach these issues.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DAVID PORTER	§	
PLAINTIFF,	§	
VS	§	CIVIL ACTION NO
UNITED AUTOMO-	§	3:92-CV-0690-D
BILE, AEROSPACE	§	
AND AGRICULTURE	§	
IMPLEMENT WORK-	§	
ERS OF AMERICA,	§	
ET AL	§	
DEFENDANTS	§	

JUDGMENT

Filed June 21, 1993

For the reasons set out in a memorandum opinion and order filed today, it is ordered and adjudged that plaintiff's action is dismissed with prejudice. Each defendant shall recover its or his respective taxable costs of court from the plaintiff.

Done at Dallas, Texas this 21st day of June, 1993.

/s/ Sidney A Fitzwater

SIDNEY A FITZWATER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No 93-1630

DAVID PORTER,

Plaintiff-Appellant,

versus

UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Texas
(3:92 CV 0690 D)
Filed April 8, 1994

Before GOLDBERG, HIGGINBOTHAM, and EMILIO M GARZA, Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 47.6.

IN THE UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No 93-1630

DAVID PORTER,

Plaintiff-Appellant,

versus

UNITED AUTOMOBILE, AEROSPACE
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA, ET AL

Defendants-Appellees

Appeal from the United States District Court for the
Northern District of Texas
Filed May 11, 1994

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 04-08-94; 5 Cir., _____, ____ __ F.3d _____)

(May 11, 1994)

Before GOLDBERG, HIGGINBOTHAM, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Patrick E Higginbotham
United States Circuit Judge

Supreme Court, U.S.
FILED
SEP 9
OFFICE OF THE CLERK

No. 94-298

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

DAVID PORTER,

Petitioner,

v.

UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA-UAW; ROY HERNANDEZ; and JOHNSON CONTROLS, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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UAW AND HERNANDEZ RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
COUNTER STATEMENT OF THE FACTS	1
REASONS FOR DENYING THE WRIT	6
I. THE FIFTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT	6
II. THE FIFTH CIRCUIT'S DECISION DOES NOT SANCTION A DEPARTURE FROM THE LAW	7
CONCLUSION	8

TABLE OF AUTHORITIES

CASES — Page

Abrams v. Communications Workers of America, 818 F. Supp. 393 (D.D.C. 1993) 6
Aguinaga v. United Food and Commercial Workers International Union, 993 F.2d 1463 (10th Cir. 1993) 7
Air Line Pilots Association v. O'Neill, 499 U.S. 65 (1991) 6
Anderson v. Liberty Lobby, 477 U.S. 242 (1986) 7
Black v. Ryder/P.I.E. Nationwide, Inc., 15 F.3d 573 (6th Cir. 1994) 6-7
Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (R. 5th Cir., Vol. I, p. 115) 7
Cox v. Administrator United States Steel and Carnegie, 17 F.3d 1386 (11th Cir. 1994) 7
Dunlap v. United Transportation Union, 826 F. Supp. 957 (E.D. Va. 1992) 6
Fraz v. Omaha World Herald Company, 960 F.2d 1370 (8th Cir. 1992) 7
Johnson v. United Steelworkers of America, 843 F. Supp. 944 (M.D. Pa. 1994) 6
Lewis v. Tuscan Dairy Farms, Inc., 829 F. Supp. 665 (S.D.N.Y. 1993) 6
Linton v. United Parcel Service, 15 F.3d 1365 (6th Cir. 1994) 7
Marino v. Writers Guild of America East, Inc., 992 F.2d 1480 (9th Cir. 1993) 7
Matsushita Electric Industries Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 7
Nida v. Plant Protection Association National, 7 F.3d 522 (6th Cir. 1993) 7
Souter v. International Union, UAW, 933 F.2d 595 (7th Cir. 1993) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-298

DAVID PORTER,

Petitioner,

v.

UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA-UAW; ROY HERNANDEZ; and JOHNSON CONTROLS, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

UAW AND HERNANDEZ RESPONDENTS' BRIEF IN OPPOSITION

COUNTER STATEMENT OF THE FACTS

At all times, Petitioner David Porter was employed at Johnson Controls, Inc. (the "Employer"), and represented for purposes of collective bargaining by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (the "UAW") and its Local 119 (the "Local").

It was the employer's usual practice, pursuant to the collective bargaining agreement, to identify the employee who would be required to work overtime a week in advance.[1]

Accordingly, Porter was notified a week in advance that if anyone was needed to work overtime, he was the "low man." (Pet. App. 12-13).

At approximately 2:00 p.m. on May 29, 1990, Glenda Locke, Porter's co-worker on the second shift, reported to work with a doctor slip stating that she could not work on her regular job because it required lifting. Consequently, it was necessary for Porter's supervisor, Allen Arnold, to find a first shift operator willing to work four (4) hours of overtime. He asked for volunteers to stay but no one was willing to stay. Arnold then confirmed

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[1] The collective bargaining agreement at Article IV, Section 3 provides in pertinent part:

"Section 3. Overtime Equalization.

(a) When a department is scheduled to work overtime, overtime opportunity hours will be distributed as evenly as practical among those employees in the department, on the shift, permanently performing the job. These employees will have the first opportunity for overtime. After the above is exhausted, employees in the department who are qualified will have the option by seniority. If no one volunteers as stated above, the employee permanently performing the job with the lowest overtime hours may be required to work, providing a disparity as indicated in Article IV, Section 5(c) does not occur.

(b) When overtime is required, notice will be given as soon as practical and no later than noon for daily overtime and 8:00 p.m. Wednesday for Saturday overtime except in circumstances beyond the control of the Company. This commitment shall not be construed to permit the employee(s) with the fewest overtime hours to refuse to work daily overtime when required due to absenteeism. Individual problems regarding required overtime will be given consideration."

(Pet. App. 13).

that Porter had the fewest overtime hours and instructed him to stay and work four (4) hours of overtime on the second shift because of Ms. Locke's absence. Porter refused to stay and stated that he had to pick up his son after school. Arnold reminded Porter that he was the operator with the fewest overtime hours and that pursuant to Article IV, Section 3 of the Collective Bargaining Agreement, he was required to stay and work overtime.

Nevertheless, Porter refused Arnold's direct order to stay and work overtime and left the facility when his shift was over at 2:45 p.m. (Pet. App. 12)

Porter was discharged for insubordination for refusing Arnold's direct order to work overtime.[2] The Local submitted a grievance in protest of the discharge pursuant to the grievance procedure in the collective bargaining agreement and processed it at step two, the step at which grievances regarding discharges are initiated. At step three in the procedure, the International Union representative assigned to the facility is included in the process. Here, that individual was Defendant Roy Hernandez. Accordingly, Hernandez attended the step three meeting concerning Porter's discharge. There he heard the employer's version of the facts leading to the decision to discharge, and learned that Porter had received many prior disciplinary notices for alleged violations of work rules. Before the step three meeting, Hernandez had reviewed the grievance and the collective bargaining agreement and talked with Local Union Bargaining Committee Chairman Mike Cross, the other bargaining committee members and Porter's co-workers to learn what Porter's version of the facts were.

---

[2] Porter was found to have violated Johnson Controls' Intolerable Rule 6, which prohibits the "refusal to obey a reasonable instruction of any supervisor." Intolerable Rules Infractions, Johnson Controls MSF Ex. 1. The penalty for violating the rule is "immediate discharge upon the first offense unless there are moderating circumstances which, in the Company's discretion, allow a lesser penalty." (Pet. App. 5 n.3)

After the step three meeting, Hernandez consulted with other members of the International Union staff in order to evaluate the merits of the greivance. Hernandez negotiated a settlement with the employer whereby Porter would have been reinstated to employment with a probationary period but without back pay. Based on his investigation and his experience, Hernandez believed that he would not have obtained a better result at arbitration. When Porter refused the offer, the employer withdrew it. (Pet. App. 5 and 6)

Porter admitted in his deposition that on October 17, 1990, Hernandez informed him that the grievance would not be submitted to arbitration because Hernandez, the individual who would have presented the case at arbitration, believed that the grievance was not winnable. During the October 17, 1990 telephone conversation with Hernandez, Porter asked him to send a letter to confirm the withdrawal of the grievance. On November 6, 1990 the letter was sent (R. 5th Cir., Vol. I, p. 115, Porter dep. 19-21 and Exhibit 2). Hernandez' decision to cancel the arbitration was not kept secret from Porter. On November 8, 1990, Porter filed an unfair labor practice charge with the National Labor Relations Board against the Union to protest Hernandez' decision to withdraw the grievance. The NLRB refused to issue a complaint because the settlement offer of reinstatement without back pay was reasonable and because there was no evidence that the UAW's decision not to arbitrate was based on any unlawful motive. Porter appealed this decision, but the charge was again refused. (Pet. App. 2 n.2) The collective bargaining agreement does not require that all grievances be presented to arbitration. (Pet. App. 6)

By 1991, the Local Union officials agreed with Hernandez' assessment of the merits of Porter's case. In February, during local contract negotiations, Local Union Bargaining Committee Chairman Mike Cross, not Hernandez, again negotiated Porter's return to work with full seniority. (R. 5th Cir., Vol. I, p. 115, Porter dep. pp.

11, 12; Exhibit 8 p. 3; R. 5th Cir., Vol. I, p. 115, Hernandez dep. 94, 95) This negotiated settlement was consistent with the UAW Constitution's requirement of Article 19, Section 2 that during contract negotiations, local union officials shall paricipate in resolving pending grievances because Cross was a local union official and he negotiated the February, 1991 settlement. (R. 5th Cir., Vol. I, p. 109)

Porter never reported to work pursuant to the agreement made in February, 1991 by Cross and Company. (R. 5th Cir., Vol. I, p. 109, Porter dep. Exhibit 8 p. 3) (R. 5th Cir., Vol. I, p. 115, Hernandez dep. 97, 98)

On April 12, 1991 Porter, through his attorney Arch Skelton, finally sent an untimely written appeal of Hernandez' October 17, 1990 decision to International Union President Owen Bieber pursuant to Article 33 of the UAW Constitution. (R. 5th Cir., Vol. I, p. 115, Porter dep. Exhibit 6) Porter did not exhaust his internal union appeals by further appealing the denial of the first level of appeals.

This action was commenced on April 10, 1992 alleging that Johnson Controls breached the collective bargaining agreement between Johnson Controls and UAW by discharging Porter and that UAW and Hernandez breached their duty of fair representation by withdrawing the grievance from arbitration. After the completion of discovery, defendants moved for summary judgment. The district court issued a written opinion granting both motions and dismissed the case. The district judge held that, "Based on the record, it does not appear that Hernandez's decision to forego arbitration was so far outside a wide range of reasonableness as to be irrational." (Pet. App. 6-7)

Furthermore, the district judge ruled that, "UAW's and Hernandez's representation of Porter in connection with his grievance was neither arbitrary, discriminatory nor in bad faith. The decision not to invoke arbitration after evaluating the merits of Porter's grievance constituted a

permissible exercise of the Union's discretion." (Pet. App. 9)

As to the employer's motion, the district court judge held, "the record shows that the order to Porter to work overtime on May 29, 1990 was not unreasonable" and that "Johnson Controls did not violate the CBA when it ordered Porter to work overtime on May 29, 1990." (Pet. App. 12 and 14)

The Fifth Circuit affirmed the district court and denied petitioner's Petition for Rehearing and Suggestion for Rehearing and Suggestion for Rehearing En Banc in Per Curiam decisions.

REASONS FOR DENYING THE WRIT

I. THE FIFTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT

Petitioner contends that the district court erred in evaluating defendant's conduct by the standard established in *Air Line Pilots Association v. O'Neill,* 499 U.S. 65 (1991) instead of by a standard set forth in earlier cases. He further contends that the Fifth Circuit's affirmation of the appropriateness of applying the *Air Line Pilots Association v. O'Neill* standard conflicts with other circuits. Neither of these contentions are supported by the facts. Virtually every circuit applies the *Air Line Pilots Association v. O'Neill* standard to evaluate the merits of the "hybrid" Section 301 cases such as this one.[3] *Black v.*

[3] There are no published decisions on this issue from the First, Second, Third or Fourth Circuit Courts of Appeal. However, district courts in those circuits have adopted the *Air Line Pilots Association v. O'Neill* standard in *Dunlap v. United Transportation Union,* 826 F. Supp. 957 (E.D. Va. 1992); *Johnson v. United Steelworkers of America,* 843 F. Supp. 944 (M.D. Pa. 1994); *Lewis v. Tuscan Dairy Farms, Inc.,* 829 F. Supp. 665 (S.D.N.Y. 1993) and *Abrams v. Communications Workers of America,* 818 F. Supp. 393 (D.D.C. 1993).

Ryder/P.I.E. Nationwide, Inc., 15 F.3d 573 (6th Cir. 1994); *Linton v. United Parcel Service*, 15 F.3d 1365 (6th Cir. 1994); *Nida v. Plant Protection Association National*, 7 F.3d 522 (6th Cir. 1993); *Souter v. International Union, UAW*, 933 F.2d 595 (7th Cir. 1993); *Fraz v. Omaha World Herald Company*, 960 F.2d 1370 (8th Cir. 1992); *Marino v. Writers Guild of America, East, Inc.*, 992 F.2d 1480 (9th Cir. 1993); *Aguinaga v. United Food and Commercial Workers International Union*, 993 F.2d 1463 (10th Cir. 1993); and *Cox v. Administrator United States Steel and Carnegie*, 17 F.3d 1386 (11th Cir. 1994). Hence, Petitioner's contention is incorrect.

II. THE FIFTH CIRCUIT'S DECISION DOES NOT SANCTION A DEPARTURE FROM THE LAW

Petitioner's argument that the district court misapplied the law and made erroneous determinations of material disputed facts is incorrect. The record shows that the district court applied the standards for evaluating motions for summary judgment enunciated in *Matsushita Electric Industries Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). (R. 5th Cir., Vol. I, p. 115)

These cases vest the district court with the discretion with which to, *inter alia*, determine whether a party has failed to make a showing sufficient to establish the existence of an element essential to his case and on which that party will bear the burden of proof at trial and, if not, to enter a summary judgment against that party. *Celotex Corp. v. Catrett, supra.*

In the case at bar, Arnold's affidavit was uncontradicted. Arnold's affidavit established that the employer notified Porter of the need for him to work overtime as soon as the need was known, and that Porter disobeyed a direct order to work overtime. Porter did not produce any evi-

dence to support his argument that others who refused to work overtime were not discharged by the employer. Porter produced no evidence that the overtime order was unreasonable. Therefore, the district court properly found that the order for Porter to work overtime was reasonable and the employer did not breach the collective bargaining agreement in terminating Porter's employment.

Accordingly, there was no reason to believe that the grievance would have to be sustained by an arbitrator. Therefore, the withdrawal of the grievance was entirely appropriate. The material allegations in Hernandez testimony in deposition and in his affidavit are undisputed and demonstrate that Hernandez thoroughly evaluated the merits of the grievance. He did not act arbitrarily, in bad faith or with hostility toward Porter. The district court properly found that there was no breach of the duty of fair representation.

In reviewing this record, the Fifth Circuit Court of Appeals correctly affirmed the district court's decision.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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